United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

ORIGINAL

75-7056

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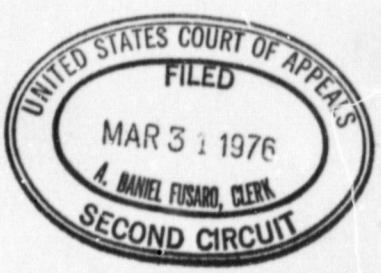
United States Court of Appeals
For the Second Circuit

SECURITIES & EXCHANGE COMMISSION,
Plaintiff-Appellee.

-against-

SAMUEL H. SLOAN, individually
and d/b/a SAMUEL H. SLOAN & CO.,
Defendants-Appellees.

PETITION FOR REHEARING AND SUGGESTION THAT THE REHEARING BE IN BANC



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QUESTIONS PRESENTED

1. Did the Court of Appeals have jurisdiction to dismiss this appeal sua sponte from an order of preliminary injunction?

2. Does the order dismissing this appeal violate the constitutional rights of the defendant-appellant?

3. Did this court err or abuse its discretion in denying the unopposed motion of the defendant-appellant to reinstate this appeal?

STATEMENT OF THE CASE

This is an appeal from an order of preliminary injunction entered by the Hon. Robert J. Ward on January 17, 1975. According to the SEC's interpretation of this order, the defendant-appellant Samuel H. Sloan ("Sloan")

was ordered to produce all of his financial records for examination by officers of the SEC. On March 9, 1975, Sloan was struck by an automobile in upstate New York with the result that both of his legs were broken. On March 24, 1975 the SEC filed a motion returnable April 1, 1975 for an order adjudging Sloan to be in civil contempt of court. The motion papers were not personally served on Sloan although they were mailed by certified mail to his hospital room in Plattsburgh, New York. The motion papers did not give Sloan the ten days notice which is required by Rule 9(c)(2) of the General Rules for the Southern District of New York nor did they give the additional three days provided for in Fed. R. Civ. P. 6(e). No order to show cause or other expediting order was presented to or signed by Judge Ward.

Sloan did not file a response to this motion, which was not surprising since Sloan was 400 miles away, had two broken legs, was experiencing great pain and suffering and was in a state of shock because of the knowledge that he could not expect to walk for six months. However, neither this nor the numerous procedural irregularities nor the fact that the moving affidavit of the SEC consisted almost entirely of statements made "upon information and belief "deterred Judge Ward from acting and, on July 22, 1975, he "adjudged Sloan in civil contempt" although he stated that "In view of his physical condition, the Court will

not at this time order his imprisonment . . . ."

Sloan, who by now was convalescing in his home town of Lynchburg, Virginia and was still bedridden promptly filed by mail a motion for a hearing, for an order transferring the case to the Western District of Virginia, Lynchburg Division, and for other relief.

On August 18, 1975 Judge Ward denied this motion as follows:

> "Defendant having failed to present facts or legal reasons sufficient to form a basis for the granting of any portion of this motion, the motion is in all respects denied
>
> It is so ordered."

Subsequently, Sloan appealed. That appeal is still pending under Docket Number 75-6106. Briefs have been filed, oral argument has been scheduled for April 27, 1976.

On September 26, 1975 Judge Ward sentenced Sloan in effect to a term of life imprisonment unless he produced his financial records "to the satisfaction of the SEC." Sloan was not present on that occasion or on any occasion subsequent to January 17, 1975.

On January 7, 1976 the instant appeal from the order of preliminary injunction was dismissed sua sponte by this court. The pertinent part of the summary order stated:

> " . . . The appeal . . . is dismissed. See United States v. Sperling, 506 F. 2d 1323, 1345 n. 33 (2d Cir. 1974), and authorities there cited."

No action was taken by this court with respect to the appeal from the civil contempt order.

Subsequently, Sloan's mother, Dr. Marjorie Sloan, contacted Thomas L. Taylor III, the SEC attorney on this case and offered to permit the SEC to examine all of Sloan's financial records. This offer was declined by Mr. Taylor who stated that the SEC was not willing to undertake the examination of Sloan's records at that time.

On February 6, 1976 Sloan moved to reinstate this appeal. No opposition to this motion was filed by the SEC. Nevertheless, this court summarily denied the motion on March 14, 1976 in all respects. The defendant-appellant now petitions this court for a rehearing and suggests that the rehearing be in banc.

ARGUMENT

At the outset it should be noted that this court dismissed this appeal and refused to reinstate the same without having the complete record before it. In particular, there is a transcript of the minutes of a hearing before Judge Ward on February 2, 1976 which is highly pertinent to this appeal. This transcript was transmitted to this court as promptly as possible but did not arrive here until March 18, 1976 or three days after this court denied Sloan's motion to reinstate this appeal. A second transcript of the proceedings of February 4, 1976 before Judge

Ward has been ordered but has not as yet been prepared.

The first of these two transcripts shows that on February 2, 1976 Judge Ward explained the decisions of this court as follows (Transcript p. 7):

> THE COURT: Yes, and I have been in communication with the Court of Appeals and the way the matter has been left is you were to appear here before me first and purge yourself of your contempt and at such time as I was satisfied that you had purged yourself of contempt I was to permit you to proceed to the Court of Appeals."

Thus the view stated by Judge Ward here and at other places in the same transcript (pp. 12, 20) was that the Court of Appeals had established that Sloan could not appeal until he had "purged himself of his contempt." Judge Ward further stated that in failing to do so Sloan had "shown the most flagrant disregard of the judicial process imaginable" (transcript p. 80).

Assuming that Judge Ward was correct in his statement of the rationale for this court's decision, it is apparent that this court has misapprehended the law. An adjudication of civil contempt does not deprive a litigant of the right to appeal. To the contrary, it is necessary for a litigant to be in contempt of court in order to appeal from certain types of judicial orders. United States v. Ryan 402 U.S. 530, 532 (1971). Included among these are discovery orders which require the production of books and records which is precisely what is involved in this case.

It should be noted that although the order appealed from here is a preliminary injunction from which an appeal could have been taken even if no contempt were involved, Judge Ward characterized it as a discovery order (transcript p. 68) which was essentially correct although the Order is couched in language which confuses the issue.

The Supreme Court decision of Maness v. Meyers 419 U.S. 449 (1975) warrants careful study because it is a recent and authoritative statement on the somewhat confused case law which is concerned with the issues involved here. That decision arose when a defendant in civil injunction action was ordered to produce 52 allegedly obscene magazines and refused to do so claiming the order violated the Fifth Amendment privilege against self-incrimination. Both he and his attorney were adjudged to be in contempt of court.

In its decision, the Supreme Court stated, 419 U.S. at 460:

> "When a court during trial orders a witness to reveal information, however, a different situation may be presented. Compliance could cause irreparable injury because appellate courts cannot always "unring the bell" once the information has been released. Subsequent appellate vindication does not necessarily have its ordinary consequence of totally repairing the error. In those situations we have indicated the person to whom the order is directed has an alternative:
>
> '[W]e have consistently held that the necessity for expedition in the administration of the criminal law justifies putting one who seeks

> to resist the production of the desired information to a choice between compliance with a trial court's order to produce prior to any review of that order, and resistance to that order with the concomitant possibility of an adjudication of contempt of his claims are rejected on appeal. (citations omitted)."

The statement "if his claims are rejected on appeal" clearly implies that in such a case the defendant has the right to appeal. Thus it is obvious that this court is in error in dismissing this appeal.

Another point should be made here with regard to the jurisdiction of this appellate court and the district court as well. During the proceedings of February 2, 1976 the following colloquy took place (transcript pp. 9-10):

> "MR. SLOAN: Your Honor, my position has always been that this Court has no jurisdiction over me and the order was illegal and there is no requirement or any case I can find or any law that requires me to comply with an illegal order.
>
> THE COURT: Then you ignored it, is that it? Am I not correct that when you were dissatisfied with my order, you proceeded to take the matter to the Court of Appeals?
>
> MR. SLOAN: That's right.
>
> THE COURT: And what did they do?
>
> MR. SLOAN: Well, I assume you are referring to the fact I made a motion for the stay of the order?
>
> THE COURT: Yes, what did they do?
>
> MR. SLOAN: They denied the motion.
>
> THE COURT: And did you then go to a justice of the United States Supreme Court for a stay?
>
> MR. SLOAN: That's right.

THE COURT: What did he do?

MR. SLOAN: Denied the motion.

THE COURT: And you did what? You ignored due process, didn't you?

MR. SLOAN: I don't think this is due process. That is my whole point. My point is this Court -

THE COURT: You determined to participate for just so long the matters were to your advantage and after you lost the ball game you walk away and say, "There wasn't any ball game in the first place."

That's your position, is it not?

MR. SLOAN: Well, I didn't determine to participate. The SEC instituted a lawsuit against me, I am defending as best I can.

THE COURT: Did you deny the allegations in their contempt motions, did you seek reargument and a stay of this Court's order and then after all your avenues of defense were exhausted, did you just ignore this Court?

MR. SLOAN: My avenue of defense may very well be doing exactly what I did. If the Court doesn't have the power to enforce an order, the order is a nullity. What you are saying in effect is that you are requiring me to give this Court jurisdiction which I claim the Court doesn't have.

THE COURT: Let me suggest this: There are ways to test that other than by, after you have exhausted the judicial process, ignoring the Court. And I take a very serious view of this. I remand you at this time to the custody of the marshal. We shall await the arrival of the Commission. If the Commission states they have no further interest in you, I will determine what to do next. But if they indicate to me, contrary to what you have said, that they desire to see your books and records, you will remain in custody until those records are displayed to the investigators of the Commission at which time I will consider by what you have then done whether or not you have purged yourself of contempt. And, if you have, you will be released from custody.

The colloquy just described took place with just Judge Ward, his clerks, Sloan and the U.S. Marshal in the courtroom. Eventually, two attorneys for the SEC showed up and Judge Ward took testimony and made eleven findings of fact and seven conclusions of law. (Transcript pp. 68-74).

It is submitted that there can be no doubt that this appeal raises issues which should and indeed according to the U.S. Code must be decided by this Court. This court will eventually have to resolve these issues anyway because it must be remembered that this is an appeal from an order of preliminary injunction and, at some point in the future, after Sloan and the SEC have gone to considerable additional effort and expense, a final judgment will be entered in this case and the same issues will no doubt be raised in the appeal which follows.

It is suggested that the rehearing of this appeal be in banc. The constitutional questions involved in this appeal are of obvious importance as are the questions concerning the manner in which justice is administered in Judge Ward's courtroom. It is submitted that the merits of this appeal must be resolved in Sloan's favor in view of Supreme Court decisions in See v. City of Seattle 387 U.S. 541 (1967) and Spevak v. Klein 385 U.S. 511 (1967). For all of these reasons, the defendant-appellant believes that a

rehearing in banc is appropriate.

CONCLUSION

For all of the reasons set forth above, this petition for a rehearing should be granted and the suggestion that the rehearing be in banc should be adopted.

Respectfully submitted,

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(212) 299-2095

Dated: March 29, 1976

STATE OF NEW YORK)
: SS.
COUNTY OF NEW YORK)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 29 day of March 1976 deponent served the within - Petition upon:

Michael J. Steward, Esq.
Securities & Exchange Commission

attorney(s) for

Appellee

in this action, at

500 N. Capitol St.
Washington, D.C. 20549

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Robert Bailey

Sworn to before me, this 29
day of March, 1976.

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1977